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No. 80-1400

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CITIES SERVICE OIL COMPANY,

Petitioner,

v.

TIRE SALES CORPORATION, GEORGE NORDSTROM and EDWARD LAUGHLIN,

Respondents.

On Petition For Writ Of *Certiorari* To The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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REPLY TO RESPONDENTS' "STATEMENT OF THE CASE"

Respondents seek to discourage review by flagrantly misstating the record.

Throughout their statement of the case, respondents convey the impression that their business was a thriving enterprise that was "done in" by the actions of Citgo. In fact, at the end of 1970*, Tire Sales had a negative net worth of $17,000, was $80,000 in debt to Uniroyal and $80,000 in debt to Citgo. (T. 361-367, 1097;

* Citgo's alleged restraint did not start until 1971.

PX 11). In rejecting Tire Sales' application for a loan in the first quarter of 1971, Citgo's financial analyst concluded: "Based on the current financial condition of Tire Sales . . . the firm would have difficulty meeting its debt requirements, and in fact would need additional financing." (PX 11).

Tire Sales further misleads this Court by creating the impression that fourteen of its "40 or 50" Citgo dealer customers testified on the vital coercion issue. In fact only eight dealers testified.* The Court of Appeals found that only two dealers were directly threatened, Critchett and Raczkowski (Appendix 7a). The first threat, according to Critchett, was "more or less hinted" at by Citgo and diverted a *de minimis* total of $622.00 in TBA sales to Berry. The second, to Raczkowski, diverted none. The other six dealers that testified *all* said that neither their lease nor gasoline supply, the alleged tying products, had been threatened by Citgo. Dealer Perry testified that Citgo said that ". . . they would *appreciate* it . . ." if he bought from Berry. Dealer Hafer testified that he was "glad" to buy from Berry because he preferred Goodyear tires. *All* of the eight dealers testified that they did not agree with any other dealer to boycott Tire Sales and none of the dealers testified that they agreed with Citgo to boycott Tire Sales. Lastly there was *no* evidence of exclusive dealing presented by respondents.

Respondents' evidence was clearly not sufficient to support a reasonable inference of a pattern of coercion or threats to 40 or 50 Citgo dealers such as the Court of Appeals erroneously found. Thus, the District Court correctly ruled that there was not ". . . a *prima facie* establishment of the fact that the dealers were compelled to buy TBA from Berry, or compelled or coerced not to buy TBA from Tire Sales." (Appendix 37a).

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* Dealers Pappalardo, Franklin, Vallow, Novak, Story and Asbridge did *not* testify contrary to Respondents' Brief (p. 8).

ARGUMENT

I.

CERTIORARI SHOULD BE GRANTED TO REVIEW THE COURT OF APPEALS' DECISION WHICH IS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEAL AND THIS COURT.

Respondents contend that the "interlocutory" status of the Court of Appeals' decision necessitates denial of Citgo's petition for *certiorari*. However, this Court has granted *certiorari* in many cases meriting review despite their "interlocutory" status. See *Estelle v. Gamble*, 429 U.S. 97 (1976); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403 (1915); and *Forsyth v. City of Hammond*, 166 U.S. 506 (1897). Here the effect of the Court of Appeals' decision is the unprecedented expansion of antitrust liability beyond the carefully developed limits established by this Court, in direct conflict with decisions of the other Courts of Appeal. The benefits from resolution of those conflicts will far outweigh any detriment resulting from review of an "interlocutory" case.

Further, the Court of Appeals' decision enshrines erroneous legal principles, cited at length in the Petition, as the law of this case on retrial. Because the Court of Appeals' ruling "is fundamental to the further conduct of the case," *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945), it merits review by this Court.

Respondents assert that the Court of Appeals was correct in ruling that their evidence, viewed in the light most favorable to them, was sufficient to state a *prima facie* tying claim. If this were a case involving only the

Court of Appeals' assessment of respondents' evidence against the appropriate legal standard their argument might have merit. But here the Court of Appeals erroneously used a standard applied in cases decided under §5 of the FTC Act to circumvent the requirement that proof of a tie-in requires proof that sale of the tying product was conditioned on purchase of the tied product. (Petition, pp. 10-19). Because the Court of Appeals thus measured plaintiff's proof by the wrong legal standard, its decision is in error. Because that decision is in conflict with decisions of other Courts of Appeal and of this Court, *certiorari* should be granted. Because no inference drawn from the evidence in respondents' favor can cure the Court of Appeals' application of the wrong legal standard, respondents' argument is without merit.

Respondents' contention that the Petition is merely an exercise in dissecting respondents' evidence is also erroneous. Even in a conspiracy case, the whole is never greater than the sum of its parts. The whole of respondents' proof does not demonstrate a pattern or policy of threatened loss of the tying products (gasoline and station leases) to force the sale of the tied product. Even the Court of Appeals acknowledged this by its ability to cite only two incidents of such threats, one of which diverted $622.00 in sales and the other, none. Nonetheless, that Court found tying liability by borrowing "unfair competition" law from §5 of the FTC Act and creating a special rule of antitrust liability for oil companies which states: in selling to dealers, a suggestion is "tantamount to command." (Petition, pp. 14-19). It is this imposition of an erroneous legal standard which creates the conflicts which merit this Court's review. (Petition, pp. 10-13).

Respondents deny that the Court of Appeals' decision effectively prohibits a "dominant" petroleum distributor

from selling other products to its dealers. Yet their Brief fails to explain how petitioner could compete in the TBA market without making "suggestions" as to TBA purchases which would be "tantamount to command" and thus illegal. As noted in the Petition (pp. 16-17), the Court of Appeals' erroneous use of the FTC Act standard precludes salesmanship for fear of tying liability, thus stifling competition.

Respondent cannot rebut the fact that the grafting of the FTC Act standard onto the law of tying erroneously expands antitrust liability to the detriment of competition, in direct contravention of the purpose of the antitrust laws. *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). Instead, respondents contend that the Court of Appeals did not rely exclusively on FTC Act cases because that Court also cited (Appendix, 11a) three antitrust cases: *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207 (9th Cir. 1977); *Osborn v. Sinclair Refining Co.*, 286 F.2d 832 (4th Cir. 1960) and *Richfield Oil Corp. v. Karseal Corp.*, 271 F.2d 709 (9th Cir. 1959). It is clear that the Court's citation of those cases as a tag-end makeweight does not change the fact that the standard of liability imposed by the Court comes not from those cases, but from the FTC Act cases* involving the TBA "commission system" not at issue in this case.

Further, those cases do not support the Court of Appeals' decision. *Osborn* involved an express agreement, extracted from a service station dealer by prior lease cancellations, tying the issuance of a new lease to the purchase of TBA. *Moore* involved express conditions imposed by cemeteries tying the sale of burial lots to the

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* E.g., *Federal Trade Commission v. Texaco, Inc.*, 393 U.S. 223 (1968); *Atlantic Refining Co. v. Federal Trade Commission*, 381 U.S. 357 (1965); *Shell Oil Company v. Federal Trade Commission*, 360 F.2d 470 (5th Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967).

purchase of grave markers and installation services. There were *no* such express tying agreements in respondents' proof. No dealer testified that he agreed with any Citgo representative to purchase TBA from Berry as a condition to issuance or renewal of a lease or gas supply contract.

Atlantic Richfield was an exclusive dealing case, not a tying case, grounded on a prior government judgment against defendant utilized by plaintiff as *prima facie* evidence of liability pursuant to 15 U.S.C. §16. The Court there simply had no occasion to address the elements of a tying claim. Thus none of these cases cited by the Court of Appeals could possibly support its ruling or obviate the contention that it imposed tying liability by relying exclusively on cases decided under §5 of the FTC Act.

Respondents also contend that *certiorari* ought be denied because they have proved the "economic power" and "substantiality of commerce" elements of a *per se* tying claim. But respondents produced *no* evidence of any competitive advantage enjoyed by the alleged tying products as required by this Court's decision in *United States Steel Corp. v. Fortner Enterprises, Inc., (Fortner II)*, 429 U.S. 610 (1977), (Petition, pp. 19-23). The Court of Appeals' decision thus created a rule of law that a *prima facie* tying case can be proved without evidence of the "economic power" of the tying product, in direct conflict with this Court's decision in *Fortner II* and the decisions of the Courts of Appeal in *Yentsch v. Texaco, Inc.*, 630 F.2d 46 (2nd Cir. 1980) and *Spartan Grain & Mill Co. v. Ayers*, 581 F.2d 419 (5th Cir. 1978), *cert. denied*, 444 U.S. 831 (1979). (Petition, pp. 20-23).

Respondents attempt to justify its failure to prove the economic power element by claiming that Citgo relies on the "obsolete" standard of *Times-Picayune Publishing*

Co. v. United States, 345 U.S. 594 (1953), that respondent was required to prove the "monopoly power" of the tying product. That assertion is simply not true. Although this Court's decision in *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1 (1958) does not require a plaintiff to prove that the tying product had "monopoly power," that decision, and the later decision in *Fortner II*, clearly require a plaintiff to prove "economic power" of the tying product by showing that it possessed some competitive advantage over similar products. Because respondents put on no such evidence, they failed to prove a *per se* tying case under the Sherman Act and the Court of Appeals' contrary decision conflicts with rulings of this Court and other Courts of Appeal.

Respondents also contend that they proved the "substantiality" element by proving the total amount of TBA purchases by their former customers from Berry and by proving the total amount of TBA purchased by all Citgo dealers in the Chicago metropolitan area. This argument ignores the fact that only $622.00 in TBA purchases were diverted to Berry by a tie-in and only "40 or 50" of the hundreds of Citgo dealers in the Chicago area were respondents' customers. (Petition, pp. 23-24). Respondents thus failed to prove that a tying violation of the antitrust laws diverted a substantial volume of commerce and failed to prove a *per se* tying claim. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969).

Finally, respondents also argue that the Court of Appeals' decision could be upheld on grounds not relied upon by the Court of Appeals, such as "group boycott, exclusive dealing and conspiracy to restrain trade." Yet respondents clearly failed to prove a "rule of reason" conspiracy to restrain trade or exclusive dealing claim because they put on no evidence of exclusive dealing or

evidence defining a relevant market and demonstrating the impact of the alleged restraint in that market. *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961). Further, respondents failed to prove a *per se* boycott claim because they failed to prove any agreement or conspiracy to boycott respondents for an anticompetitive purpose. See, e.g., *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531 (1978). Finally, even if alternative grounds for affirmance might be found, that fact in no way lessens the direct conflict in the law of tying created by the Court of Appeals' decision, which concerned *only* a *per se* tying claim.

Therefore, none of respondents' arguments dispel the clear and direct conflicts in precedent created by the decision of the Court of Appeals. Because of the inherently adverse effect that decision will have on the further conduct of this case, and upon competition itself, this Court ought grant the writ sought.

II.

THIS COURT OUGHT GRANT *CERTIORARI* TO REVIEW THE COURT OF APPEALS' CREATION OF AN "ANTITRUST DEFENSE" TO CONTRACTUAL LIABILITY IN DEROGATION OF THE EXPLICIT DECISIONS OF THIS COURT AND IN DIRECT CONFLICT WITH NUMEROUS DECISIONS OF THE COURTS OF APPEAL.

The Petition cites as an additional ground for review the conflict between the Court of Appeals' decision and the rule of law established by this Court and consistently implemented by the other Courts of Appeal, that there is no "antitrust defense" to a contract claim unless that claim seeks enforcement of the precise conduct prohibited by the antitrust laws.

The Court of Appeals' decision reversing the District Court's summary judgment against respondents on the Counterclaim for the purchase price of goods sold and delivered to Tire Sales is in direct conflict with this Court's decision in *Kelly v. Kosuga*, 358 U.S. 516 (1959) and numerous decisions of the other Courts of Appeal (Petition, pp. 24-26). *Kelly* stands for the proposition that a Sherman Act violation provides no defense to payment of the contract price unless ". . . the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act . . ." 358 U.S. at 520. The decision in *Kelly* is based upon the "overriding general policy, as Mr. Justice Holmes put it, 'of preventing people from getting other people's property for nothing when they purport to be buying it.'" 358 U.S. at 520-521.

Respondents contend that this case is distinguishable from *Kelly* because here respondents claim to have been hampered by an antitrust violation in resale of the goods for which they seek to avoid payment. However, respondents do not claim, and the Court of Appeals did not find, that requiring respondents to pay for goods they admittedly received would itself constitute a violation of the antitrust laws. Therefore, the Court of Appeals' decision created the very "antitrust defense" expressly prohibited by this Court in *Kelly*.

Respondents also assert that under state law Citgo breached an implied duty not to obstruct the purposes of the contract. However, that argument is unavailing because the Court of Appeals' decision does not rest on any state law ground, but cavalierly asserts that, as a matter of law, an antitrust violation will be a defense to respondents' contractual liability. (Appendix, 17a).

If an antitrust violation prevented respondents from reselling the goods they purchased from petitioner,

respondents may invoke the Sherman Act's express treble damage remedy which can "not be added to judicially by including avoidance of private contracts as a sanction." *Kelly v. Kosuga*, 358 U.S. 516, 519 (1959). The Court of Appeals' decision judicially adds avoidance of respondents' contract as a sanction for antitrust violations in direct conflict with the decisions of this Court and the Courts of Appeal. This Court should grant review to resolve that conflict.

Respectfully submitted,

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